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IN THE

Supreme Court of the United States

October Term, 1958

No. 346

CARLO KITTY GIACONA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Fifth Circuit

Carlo Kelly Giacona prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming his conviction for violation of Sections 4744(a)(1) and 4744(a)(2) of the *Internal Revenue Code of 1954*, which relate to non-payment of the marihuana transfer tax.

Opinions Below

The District Court for the Southern District of Texas did not render an opinion in this case, in which a jury acquitted the petitioner of four counts of a six-count

indictment, but convicted him of the remaining two counts. The opinion of the Court of Appeals affirming the conviction has not yet been reported but is reproduced as Appendix "A" to this petition.

Jurisdiction

The opinion (Appendix "A", R. 263-277) and judgment (Appendix "B", R. 278) of the Court of Appeals are dated June 30, 1958. A petition for rehearing (R. 280-282), timely filed, was denied August 11, 1958 (R. 283). The jurisdiction of this Court is invoked under Section 1254(1), Title 28, *United States Code*.

Question Presented

Whether evidence discovered by a federal agent during a clandestine nighttime search of the petitioner's place of business may be used:

(a) in evidence against him, or

(b) to establish probable cause for issuance of a warrant authorizing a search of the same premises for the same evidence, or

(c) to provide "reasonable grounds" for arresting the petitioner without a warrant so as to justify a search incident to the arrest.

Constitutional Provisions and Statutes Involved

This case involves the Fourth Amendment; Section 104(a) of the Narcotic Control Act of 1956, 70 Stat.

570, 26 U.S.C. 7607; and Rule 41(d), *Federal Rules of Criminal Procedure*. These are reproduced as Appendix "C" to this petition.

Statement of the Case

A.

The Secret Search for the Evidence Used as the Grounds for the Warrant

William T. Finley, an enforcement agent for the Federal Bureau of Narcotics (R. 31), said that he received "information" (R. 83) that marihuana was hidden under the Mecca Drive-in, a beer parlor and grocery (R. 85) operated by the petitioner (R. 12, 58-59, 196). The Mecca is a building which "sits up off the ground" about two feet on cinder block pilings (R. 39).

With other narcotics agents and a city policeman, Finley commenced a "continuous surveillance" (R. 35, 146) of the Mecca, beginning at 11:45 p. m., March 26, 1957 (R. 34). At 2 a. m., when the Mecca was closed and he could "sneak up there" in the dark (R. 80), Finley crawled through a sewer (R. 39, 43) and approached the building (R. 39), while another agent watched him with binoculars (R. 144-145).

Finley "reached up underneath the floor of the Mecca" and removed a paper bag from the top of one of the cinder block pilings (R. 40). He took the bag (Ex. 2, R. 42, 192) back to his car (R. 42) and removed a "sample" of the contents (Ex. 1, R. 40-41, 192) which he wrapped in Kleenex (R. 41, 123). With Finley, the city policeman and another agent initialled both exhibits (R. 42-43, 144) and Finley then replaced the bag under the Mecca (R. 43).

At 6 a.m., Finley telephoned another agent, Engelking (R. 44), who obtained a search warrant (R. 10-13) from a United States Commissioner. In his affidavit for the warrant, Engelking swore that he was "positive" that marihuana was concealed at the Mecca and recited these facts (R. 9):

> "Information from a reliable source was received that marihuana contained in tobacco cans and a sack were concealed under the above described buildings. The marihuana has been located under the building by Nacotic Agent, W. T. Finley."

Finley admitted that he had not seen the petitioner with marihuana (R. 94). He testified that "it was not" (R. 84) because someone had told him that he knew marihuana was under the Mecca, but "because I had gone up there and gotten a sample of it." (R. 83).

B.

The Execution of the Warrant, The Arrest of Petitioner, and The Conflict in the Evidence

The agents watched the Mecca all day, using binoculars (R. 38, 145, 148, 174) and communicating by two-way radio (R. 48). They could not see the bag "because it was underneath the house, and on top of the cinder block." (R. 44). Although they saw the petitioner several times during the day (R. 46, 84-85, 106, 146, 173), they did not try to execute the search warrant until 8 p. m., when they said they saw the petitioner drive up in his car (R. 48, 147, 174).

Agent Montague said that the petitioner "bent down, reached underneath and got a brown paper sack . . ."

(R. 148-149). Agent Bautista said that the petitioner "stooped down, picked up something, and walked back." (R. 174). Engelking turned on the headlights of his auto at this time, illuminating the scene (R. 48, 149, 175). Bautista said that the petitioner then "threw something" under the building and "ran around the corner." (R. 176). The agents closed in on the Mecca and arrested the petitioner inside, where he was drinking a Coke (R. 107, 111, 112).

Defense witnesses who had been patrons of the Mecca testified, on the other hand, that the petitioner had been there at least thirty minutes before his arrest (R. 195, 203).

The city policeman crawled under the building and found the paper bag (R. 114) bearing Finley's initials. It contained marihuana (R. 185-186). The agents also claimed that they found two tobacco cans and a glass jar of marihuana under the Mecca (R. 12, 52-53, 116) and particles of marihuana in petitioner's car (R. 60-61, 154), but the jury acquitted petitioner of the four counts of the indictment to which this testimony related (R. 246).

The officers testified that the Petitioner told them that the marihuana was not his but claimed that petitioner said that, "If he did make a statement, he would have to lie." (R. 58, 121).

C.

The Trial and the Appeal

The defense objected (R. 40, 41, 52, 72, 110, 207-225) to the admissibility of the bag and the "sample" taken

from the bag, but did not file a pre-trial motion to suppress this evidence. Petitioner's lawyer explained that he did not know about Finley's "secret trip" until Finley testified about it (R. 223). The trial judge agreed that in his discretion he could entertain the objection even though first made on trial (R. 215), but overruled it (R. 221) after argument on its merits (R. 207-215).

The Fifth Circuit conceded that petitioner had standing to object to the search (R. 269) and that the legality of the search was properly before it (R. 272-273). The Court of Appeals decided, however, that Finley needed no warrant to reach "up underneath the floor of the Mecca", that the search warrant finally issued "complied with the requirements of the Fourth Amendment", and that petitioner "was legally arrested in the very act of committing a felony, and the search immediately thereafter would be justified as incident to his arrest even if there had been no search warrant," (R. 273-277).

Reasons For Granting the Writ

A.

The Fourth Amendment's Safeguards Protect Business Establishments

"The Fourth Amendment throws a mantle of protection around 'houses' generally—not merely dwelling houses. A person's office or place of business is quite as immune from search without a warrant as his kitchen or bedroom." *United States v. DiCorato*, 37 F. 2d 124, 132-133.

Some of this Court's most-cited search and seizure opinions have shielded business premises with the Fourth Amendment. *Boyd v. United States*, 116 U.S. 616;

Silverthorne Lumber Co. v. United States, 251 U.S. 385; *Gouled v. United States*, 255 U.S. 298; *Go-Bart Co. v. United States*, 282 U.S. 384; *United States v. Lefkowitz*, 285 U.S. 452.

True, there are circumstances in which a warrant may be unnecessary for a search of business premises. In such cases, however, the establishments concerned are open for business and the officers, like the general public, may have business there.[1] Public access "during business hours" was a vital factor in *Davis v. United States*, 328 U.S. 582, 592, cited in footnote 15 to *Harris v. United States*, 331 U.S. 145, 151, to support the Court's suggestion that, "Stricter requirements of reasonableness may apply where a dwelling is being searched."

It is submitted that no authority can be found for the proposition that officers having no warrant may invade a place of business which is, like the one in this case (R. 80), closed for the night.

It is equally certain that the portion of the premises searched in this case is protected by the Fourth Amendment. Finley "reached up underneath the floor of the Mecca" (R. 40) to a place which the other officers could not see "because it was up underneath the house . . ." (R. 44). *Hester v. United States*, 265 U.S. 57, cited by the Court of Appeals (R. 274, 275), holds that a warrant is not needed to search "open fields". There is all the difference in the world between a search of "open fields" and Finley's action in probing the very bowels of this building.

[1] See **In Re Lobosco**, 11 F. 2d 892, in which the evidence was suppressed because the officers strayed from the public part of a drug store to find it in a private enclosure.

B.

The Nighttime Search of Petitioner's Closed Business Premises Was Without Any Authority and the Evidence Then Seized Should Have Been Suppressed

The Mecca was closed (R. 80) when Finley made his first search. There was no question of any arrest at that time.

There must be "compelling reasons" (*McDonald v. United States*, 335 U.S. 451, 454) or "exceptional circumstances" (*Johnson v. United States*, 333 U.S. 10, 14) to justify a search of permanent premises without a warrant. "The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn . . .", as this Court said only last June in reiterating "the settled doctrine" that probable cause is no substitute for a warrant. *Jones v. United States*, ___ U.S. ___, 78 S.Ct. 1253, 1256-1257, 2 L. Ed. 2d 1514, 1518-1519.[2]

The fact that a warrant may be easily obtained might not be the only factor determining whether one is necessary (*Rabinowitz v. United States*, 339 U.S. 56, 65-66), but should still be considered. *Rent v. United States*, 209 F.2d 893, 899. Here, the agents were present in force with all the accoutrements of the modern peace officer—automobiles, binoculars, and two-way radios. The Mecca

[2] For the reasons stated in the preceding section of this argument, the law applicable to the search of the "dwelling" in *Jones* applies equally to the search of business premises, except to the extent that persons having no interest in such premises are invited to enter them on public or private business. No such invitation exists at 2 a.m. when the premises are closed.

was closed for the night (R. 80) and the agents had both time to get a warrant and personnel to leave on guard.

Just as Mr. Justice Clark pointed out in *United States v. Jeffers*, 342 U.S. 48, 52:

> "There was no question of violence, no moveable vehicle was involved, nor was there an arrest or imminent destruction, removal, or concealment of the property intended to be seized."

These same factors led the Court to say, in *Johnson v. United States*, *supra*, 333 U.S. 10, 15:

> "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

Thus there was no legal justification for Finley's furtive search of the Mecca. His stealth was the constitutional equivalent of a forcible entry. *Gouled v. United States*, 255 U.S. 298, 305-306. All aside from the later "rediscovery" of the paper bag (Ex. 2), the seizure of the "sample" from the bag (Ex. 1) violated the Fourth Amendment.

Regardless of the weight of any other evidence, the reception of this "sample" (R. 192) was reversible error because the "harmless error" doctrine does not apply when fundamental rights have been disregarded. *Bruno v. United States*, 308 U.S. 287, 294; *Kotteakos v. United States*, 328 U.S. 750, 764-765. Furthermore, testimony about the search for the "sample" may well have swayed the jury

because petitioner was acquitted (R. 246) of all counts of the indictment not relating to the bag from which the "sample" was taken.

C.

Both Search Warrant and Arrest Depend on Knowledge Gained by Violation of the Constitution

Testifying about the basis for his knowledge about marihuana at the Mecca, Finley said "it was not" (R. 84) because someone had told him that he knew it was there (R. 83). He said, "I knew that the marihuana was up there because I had gone up there and gotten a sample of it." (R. 83). His discovery was incorporated into the affidavit used to obtain the search warrant (R. 9).

This procedure ignores Mr. Justice Holmes' words that:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Silverthorne Lumber Co. v. United States, supra*, 251 U.S. 385, 392.

Evidence discovered during an unlawful search cannot be the basis for a valid search warrant (*McGinnis v. United States*, 227 F. 2d 598, 603-604) or for a valid arrest justifying a second search (*Walker v. United States*, 225 F. 2d 447, 450).

Finley's admission that his knowledge was based on his clandestine search (R. 83) demonstrates that his "information" did not suggest any probability that an offense had been committed. Since he found it necessary to ex-

plore without a warrant, Finley hardly left the Government in a position to fall back upon his "information" as grounds for a lawful arrest. Instead, his conduct demonstrates that only the fruits of the first search provided the officers with reasonable grounds for an arrest or indicated that an offense was being committed in their presence, if one was.[3] These are the only circumstances under which narcotics agents may arrest without warrant. See 26 U.S.C. 7607, printed as Appendix "C". As in *Johnson v. United States, supra*, 333 U.S. 10, 16-17:

> ". . . the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do."

D.

The Opinion Below Encourages Stealthy Intrusions Upon Private Premises Both Without a Magistrate's Prior Approval And Without Witnesses to What Is Done

The federal agents' unconstitutional tactics in this case warrant a writ of certiorari because of "The importance of maintaining strict standards for the admissibility of evidence so challenged in the federal courts . . ." *Jones v. United States, supra*, __ U.S. __, 78 S. Ct. 1253, 1254, 2 L. Ed. 2d 1514, 1516.

The Fifth Circuit concluded that what it describes as "Mr. Finley's preliminary search" was lawful because it "might more accurately be considered a mere inspection to

[3] There was no testimony that the "brown paper bag" which Montague said he saw in petitioner's hand (R. 181) was the same bag which Finley said he found during his first search and which was later "rediscovered" under the Mecca.

verify the information which he had received." (R. 276). The novelty of this doctrine, that a search can somehow be justified by calling it an "inspection" for evidence to be used in obtaining the warrant which the officers should have had in the first place, alone calls for review by this Court because of its pernicious effect on constitutional precedent.

The particular facts of this case, however, generate another reason why the strategy used here should not be approved. That reason centers around this Court's responsibility for supervision of the integrity of federal investigations resulting in the federal trials which this Court reviews. *McNabb v. United States*, 318 U.S. 332, 340-341; *Rea v. United States*, 350 U.S. 214, 217.

Until this conviction was affirmed below, there was no lawful way for a federal agent to search permanent premises for contraband without doing at least one of two things:

(a) presenting evidence to a magistrate establishing of record that there is probable cause for belief that the contraband is already there, or,

(b) searching the premises while some person not connected with the police is present. Each of the possible exceptions to the rule requiring search warrants envisions the idea that someone will be present beside the police. If the search is to be justified as incident to an arrest, for instance, the person arrested will be there.

Even when a warrant is obtained, the law does not rely upon the applicant for the warrant to establish what was found. Rule 41(d), *Federal Rules of Criminal Procedure*, requires that the owner of the premises be allowed to wit-

ness the inventory or that some "credible person other than the applicant for the warrant" must witness it. See Appendix "C". The return (R. 12-13) to the warrant used in this case indicates that these things were done. It states, for instance, that a copy of the warrant was left with "Carlo K. Giacona, owner." These things were done at eight o'clock at night, however, not at two o'clock in the morning when Finley was alone under the Mecca.

This Court knows that officers investigating narcotics cases are engaged in an "often competitive enterprise" (*Johnson v. United States, supra*, 333 U.S. 10, 14). There are grave dangers in permitting them to "sneak" (R. 80) into a man's place of business alone and without prior authority; when the law does not permit them to be there at all under such circumstances. These dangers are not obviated by the presence of other officers, similarly engaged, in automobiles parked thirty yards away (R. 37).[1]

The evidence in this case was in conflict. Federal agents testified that the petitioner was arrested just after he drove up in his car (R. 48, 147, 174), while defense witnesses testified that the petitioner had been at the Mecca for at least thirty minutes before his arrest (R. 195, 203). If the petitioner committed any incriminating acts, it was during this period.

To experienced lawyers, it is commonplace that the outcome of a lawsuit—and hence the vindication of

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[1] Some of the perils of this practice were apparent to Lord Camden in 1765. Discussing the search under the writ now at issue in **Entick v. Carrington**, he pointed out that [illegible] to the discretion of those defendants to execute the warrant in the absence or presence of the plaintiff when he might be at home or [illegible] to see what they did [illegible] Wils. 275, 291, 19 How. St. Tr. 1029.

> legal rights—depends more often on how the fact-finder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents." *Speiser v. Randall*, —U.S.—, 78 S. Ct. 1332, 1339, 2 L. ed. 2d 1460, 1469.

It may not be possible to try contested litigation without disputed facts. It is possible to prevent federal investigators from creating new elements of uncertainty by searching premises in the dead of night without committing themselves to a magistrate in advance and without witnesses to what they do, all in violation of the Constitution and the Rules of Criminal Procedure.

Conclusion

For the reasons stated, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX "A"

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 16986

CARLO KELLY GIACONA, Appellant,
versus
UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Southern District of Texas

(June 30, 1958)

Before RIVES, CAMERON and BROWN, Circuit Judges.

Rives, Circuit Judge: Appellant was tried on a six count indictment, three counts of which charged him with acquiring or obtaining various amounts of marihuana without having paid the transfer tax imposed by the Internal Revenue Code,[1] and three companion counts with transporting or concealing, or facilitating the transportation or concealment of, the marihuana, in violation of subdivisions (1) and (2), respectively, of I.R.C. 1954, 26 U.S.C.A. §4744. The jury returned a verdict of guilty on the first two counts in each of which the amount in-

[1] Internal Revenue Code 1954, 26 U.S.C.A. §4741(a).

volved was 28 ounces of marihuana. A verdict of not guilty was returned on the remaining four counts.

Mr. Finley, an enforcement agent for the Federal Bureau of Narcotics, had received information[2] that there was marihuana contained in tobacco cans and a sack concealed on the foundation blocks which supported the sills underneath a building in which the defendant operated a business known as Mecca Drive-In Grocery in Houston, Texas. On March 26, 1957 at about 11:45 P. M., Finley and other officers set up a surveillance of said premises from an adjacent property. During the first three hours nothing happened.

At about 2:45 or 3:00 A. M., Officer Finley went on the premises, crawled up to the building, reached underneath it and took from the top of one of the foundation blocks a round paper bag. Finley took the bag back to his fellow officers in waiting, where a sample of its contents was extracted. Each of the officers initialed the bag, after which Finley restored it to the shape in which found and replaced it on the foundation block from which it had been removed. The surveillance continued all through the night without result. About six o'clock on the morning of the 27th, Finley telephoned to Narcotic Agent Fritz J. Engelking. Thereafter, Engelking went before the United States Commissioner and obtained a search warrant for the premises upon his affidavit to the following effect:

(has reason to believe)

"That he (is positive) that

(on the person of)

---

[2] From what he considered to be a reliable source and which he failed to disclose in his testimony only because of objections of defendant's counsel.

(on the premises known as) Mecca's Drive-In Grocery 5006 Jensen Drive, Houston, Texas, and being a wood frame green in color, with composition roof, one story building, as well as all other buildings on the same lot, bearing the same number under the city numbering system as above in the Sou. District of Texas, there is now being concealed certain property, namely *marihuana* in violation of Title 26, U.S.C. Section 4744(a) which are

being concealed in and under the above described premises

here give alleged grounds for search and seizure

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

"Information from a reliable source was recevied that Marihuana contained in tobacco cans and a sack were concealed under the above described building and inside one of the above described buildings. The marihuana has been located under the building by Narcotic Agent, W. T. Finley.

"1. The Federal Rules of Criminal Procedure provide: 'The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time.' (Rule 41(C)"[3]

[3] It might be noted that in cases involving a violation of certain statutes including the one here involved, Title 18, U.S.C.A. §3056(c), now provides that:

"(c) a search warrant may be served at any time of the day or night if the judge or the United States Commissioner issuing the warrant is satisfied that there is probable cause to believe that the grounds for the application exist."

The warrant authorized a search of the premises "at any time in the day or night." Engelking then joined his fellow officers in the surveillance, and they continued patiently but uneventfully watching until about 8 o'clock that night. During the afternoon the appellant was seen on several occasions at the building and in the general area. About 8:00 P. M., they observed appellant drive onto the premises, get out of his automobile, walk to some steps, talk briefly to some woman who opened a door, then go to the point of concealment and reach underneath the house. Engelking then turned on the headlights of his car, which "illuminated the defendant in his maroon shirt, standing with the bag, standing straight and facing me by the headlights." Appellant "stooped down and threw something underneath this building, and then he ran around the corner." The officers closed in and arrested him.

After appellant's arrest, Officer Jones crawled under the building and recovered the brown paper bag at the approximate place where appellant had been seen to throw something. Upon a search of the premises, additional contraband was found underneath the building. The inventory of property accompany the search warrant describes the following:

> "Two cans marihuana weighing about 900 grains in Half & Half tobacco cans. Loose marihuana weighing about 28 ounces contained in two brown paper bags. Glass Jar containing marihuana seeds. 12 Half & Half and 12 Prince Albert tobacco cans containing tobacco."

As to a statement from appellant, Mr. Finley testified:

"A. I told him that he did not have to make any statement to me, but any statement he did make to me could be held against him. Detective Jones told him the same thing. I told him that under the Fifth Amendment of the Constitution of the United States, he didn't have to say anything. He gave me his name, age, address, birth and et cetera. I asked him to tell me the truth with reference to this matter. He said, 'I can't tell you the truth. I mean, it is not mine, and I won't claim it.' And I told him, 'Well, in view of that, well if you are lying about the fact that you are not going to claim it, then, that it is yours,—' and, well, he said, 'I can't tell you the truth about that.' He said, 'It is not mine. I am not going to claim it, but I am lying.'"

The return of the search warrant and affidavit accompanied by the inventory was made on April 3, 1957. The indictment was returned on May 13, 1957. The appellant's counsel filed a motion to quash the indictment on June 4, 1957. The trial took place on October 22 and 23,

As to a statement from appellant, Mr. Finley testified: 1957. No motion for return of property or to suppress evidence was made prior to the trial.

Upon the trial, the defendant objected to Officer Finley's first search or inspection of the premises made before the search warrant issued, and also objected to the sufficiency of the affidavit and search warrant, and moved to quash the search warrant and suppress the evidence. The Government opposed these objections and motions on their merits, and also insisted that they should not be entertained because the defendant had not moved for return of the property and to suppress the evidence before trial,

calling attention to the requirements of Rule 41(e), Federal Rules of Criminal Procedure. Without indicating the ground of its action, the court overruled the objections of the defendant and his motions to quash the search warrant and suppress the evidence.

The appellant specifies and insists upon three alleged errors:

"Specification No. One

"The Court committed material error in permitting Officers Finley and Jones to testify over Appellant's objection as to an exploratory search of Appellant's business building and the result of such search, without a search warrant.

"Specification No. Two

"The Court erred in overruling Appellant's Motion to suppress the evidence offered, over Appellant's objection, of Officers Finley and Jones, obtained by a search of Appellant's curtilage without a search warrant.

"Specification No. Three

"The Court erred in overruling Appellant's Motion to Quash Search Warrant, issue in this case, which search warrant was issued upon information and belief and based upon an exploratory and illegal search made theretofore."

The Government insists that the appellant has no standing to complain of any alleged illegal search because he denied ownership of the marihuana and failed to prove ownership of or interest in the premises searched, citing *Scoggins v. United States*, D. C. Cir. 1953, 202 F. 2d 211.

and *Calhoun v. United States*, 5th Cir. 1949, 172 F. 2d 457. We do not agree. In the form in which Agent Finley testified to appellant's disclaimer of the marihuana, "I am not going to claim it, but I am lying," the jury could have inferred just the opposite.

Moreover, there was affirmative testimony that appellant operated the business conducted on the premises, which was not denied, and no evidence was offered to the contrary. Possession of the premises searched, without reference to an interest in the property seized, gave the requisite standing to raise the issue as to admissibility of evidence resulting from an alleged illegal search. *United States v. Pepe*, 2nd Cir. 1957, 247 F. 2d 838, 841; *Work v. United States*, D.C. Cir. 1957, 243 F. 2d 660, 662; *United States v. Fowler*, D.C. S.D. Calif. 1955, 17 F.R.D. 499, 502. Neither of the cases cited by the Government holds to the contrary.

The Government further insists that appellant waived any complaint of illegality of either search by failure, before the trial, to move for a return of the property or to suppress the evidence as required by Rule 41(e), Federal Rules of Criminal Procedure:

> "(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant

was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

As stated in the notes of the Advisory Committee, that rule is a restatement of the theretofore existing law and practice. The sound judicial practice is not to interrupt the orderly course of trial and break the continuity of the jury's attention by conducting a collateral inquiry into the question of whether evidence offered, otherwise competent, was lawfully or unlawfully obtained. *Segurola v. United States*, 1927, 275 U.S. 106, 112; *Nardone v. United States*, 1939, 308 U.S. 338, 341, 342; *United States v. Sheba Bracelets*, 2nd Cir. 1957, 248 F. 2d 134, 142. Strict observance of that practice is more important since the enactment on July 18, 1956 of the statute now appearing as 18 U.S.C.A. §1404, which permits the United States, in cases like this one, to appeal from an order granting a motion to suppress evidence made before trial. A defendant should not be permitted to thwart the Government's right of appeal under that statute by the stratagem of waiting until jeopardy has attached before questioning the validity of a search and seizure. Of course, however, that may be unavoidable when there has been

no opportunity to present the matter in advance of trial. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." *Gouled v. United States*, 1921, 255 U.S. 298, 313; see also, *Amos v. United States*, 1921, 255 U.S. 313, 316. So, under the terms of Rule 41(e), "The motion shall be made before trial or hearing *unless opportunity did not exist or the defendant was not aware of the grounds of the motion* * * *." (Emphasis supplied.)

Appellant insists that he came within that exception, and urges in his brief:

> "The Appellant did not know and had no means of knowing that his building had been search secretly and without a warrant at 2:00 A. M. on March 27, 1957, by the witness Finley, until said witness so testified upon the trial of this case. He immediately objected and filed a motion to suppress and to quash the search warrant."

The Government takes issue with that insistence, and points out that the appellant was informed by the affidavit for the search warrant that "The marihuana has been located under the building by Narcotic Agent, W. T. Finley," and that, thereby, the appellant must have known that Finley had searched or inspected the premises.

On that issue, we would decide with the Government if the decision were left to this Court. We do not think that this Court can review the district court's decision to entertain the motion on its merits, for the concluding clause of Rule 41(e) reads, " * * * but the district court in its discretion may entertain the motion at the trial or hearing."

When the district judge did not refuse to consider the merits of the motion to suppress because of the defendant's delay, and did not assign such delay as a ground for ruling against the defendant, we must assume that he exercised his discretion to "entertain" the motion and to give the defendant the benefit of a ruling on the merits. As said by Judge Learned Hand in *United States v. Di Re*, 2nd Cir. 1947, 159 F. 2d 818, 820, affirmed 332 U.S. 581:

> " * * * It would be a parody on justice now to hold that, although the judge was wrong in the decision which he did make, nevertheless, since he might have refused to make it at all, DiRe may not complain of the error."

We hold, then, that the appellant has standing, and is not bound by waiver; so that the question of whether either search was illegal must be decided.

When the performance of his duty requires an officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable. 52 Am. Jur., Trespass, §41. In any event, evidence is not rendered inadmissible merely because it has been obtained by a simple trespass upon land. The protection of the Fourth Amendment is not that extensive: "The right of the people to be secure in their persons, *Houses*, papers, and effects, against *unreasonable* searches and seizures, shall not be violated.* * *." (Emphasis supplied.)

In the language of Mr. Justice Holmes, speaking for the Court in *Hester v. United States*, 1924, 265 U.S. 57, 59:

> " * * * the special protection accorded by the Fourth Amendment to the people in their 'persons,

> houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226."

See also, *Edwards v. United States*, 10th Cir. 1953, 206 F. 2d 855, 856; *Martin v. United States*, 5th Cir. 1946, 155 F. 2d 503, 505.

In the *Hester Case*, *supra*, Mr. Justice Holmes further observed: "It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure." 265 U.S. at p. 58. To like effect, see *Janney v. United States*, 4th Cir. 1953, 206 F. 2d 601, 604; *Koth v. United States*, 9th Cir. 1926, 16 F. 2d 59, 61; *McBride v. United States*, 5th Cir. 1922, 284 Fed. 416, 419; *Taylor v. Fine*, D.C. S.D. Calif. 1953, 115 F. Supp. 68, 71; *United States v. Rogato*, D.C. M.D. Pa. 1930, 39 F. 2d 171, 175.

The Fourth Amendment protects against *"unreasonable* searches and seizures." Reasonableness is often a question of degree as to "when the right of privacy must reasonably yield to the right of search." *Johnson v. United States*, 1948, 333 U.S. 10, 14.

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no remedy litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. *Go-Bart Co. v. United States*, 282 U.S. 344, 357. Reasonableness is in the first instances for the District Court to determine."

United States v. Rabinowitz, 1950, 339 U.S. 56, 63. See also, *Harris v. United States*, 1947, 331 U.S. 145, 150.

What may be unreasonable in a search of a man's house, may be entirely reasonable in a search of his place of business. *Harris v. United States*, *supra*, 331 U.S. 145, 151, footnote 15; *United States v. Rabinowitz*, *supra*, 339 U.S. 56, 64; *Drayton v. United States*, 5th Cir. 1953, 206 F. 2d 35, 36.

In the present case, Officer Finley's preliminary search did not extend to the inside of the store building, but was confined to the top of a foundation block, only a foot or two removed from the "open fields" which are not within the protection of the Fourth Amendment, *Hester v. United States*, *supra*.

The nature of the search also is an important circumstance in determining reasonableness. Mr. Finley's preliminary search was not of a general exploratory nature but might more accurately be considered a mere inspection to verify the information which he had received. Compare *Davis v. United States*, 1946, 328 U.S. 582; *Harris v. United States*, *supra*; *United States v. Rabinowitz*, *supra*; *United States v. Guido*, 7th Cir. 1958, 251 F. 2d 1, 4.

As to warrants, including search warrants, the Fourth Amendment provides:

> " * * * and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[illegible] see the case relied on by appellant, [illegible] United States, 5th Cir. 1955, 224 F. 2d 681, 684, including [illegible] of McDonald v. United States, 1948, 335 U.S. 451

In *Brinegar v. United States*, 1949, 338 U.S. 160, 175, the Court said:

> "'In dealing with probable cause * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.'"

Evidence which would not be competent or admissible upon the trial may nevertheless furnish "probable cause" for the issuance of a warrant. *Brinegar v. United States*, *supra*; *Weise v. United States*, 9th Cir. 1958, 251 F. 2d 867, 868.

Whether or not the information which Mr. Finley had received "from a reliable source" would have sufficed need not be decided. Certainly, after that information had been verified by Finley's personal inspection, it constituted "probable cause." The Commissioner had a right to consider Officer Finley's location of the marihuana under the building even though the exigencies of the occasion made it necessary, or certainly convenient, for that information to be conveyed to the Commissioner by the hearsay testimony of Agent Engelking. We conclude that the search warrant was issued upon probable cause supported by affidavit, and complied with the requirements of the Fourth Amendment.

Moreover, the appellant was legally arrested in the very act of committing a felony, and the search immediately thereafter would be justified as incident to his arrest even

if there had been no search warrant. *Rent v. United States*, 5th Cir. 1954, 209 F. 2d 893, 897, and cases there cited.

The judgment is therefore

AFFIRMED.

A true copy
Test:
EDWARD W. WADSWORTH
Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana
SEAL

APPENDIX "B"

JUDGMENT,

Extract from the Minutes of June 30, 1958.

No. 16986.

CARLO KELLY GIACONA,

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C"

(Constitutional Provisions and Statutes Involved)

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 104(a) of the Narcotic Control Act of 1956, 70 Stat. 570, 26 U.S.C. 7607, provides:

> "The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401 (i) of the Tariff Act of 1930, as amended; 19 U.S.C. sec. 1401 (i)), may—
>
> (1) carry firearms, execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under the authority of the United States, and
>
> (2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

Rule 41(d), Federal Rules of Criminal Procedure, provides:

"(d) *Execution and Return with Inventory.* The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant."